



Chris Colclasure  
Deputy Director

## Arkansas Game and Fish Commission

Pat Fitts  
Director

Chris Racey  
Deputy Director

April 15, 2019

Michael McDavit  
Oceans, Wetlands, and Communities Division Office of Water (4504-T)  
Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Jennifer A. Moyer  
Regulatory Community of Practice (CECW-CO-R)  
U.S. Army Corps of Engineers  
441 G Street, NW  
Washington, DC 20314

**Re: Revised Definition of "Waters of the United States," Docket ID No. EPA-HQ-OW-2018-0149**

Mr. McDavit and Ms. Moyer,

Staff members of the Arkansas Game & Fish Commission (AGFC) have reviewed the proposed Revised Definition of "Waters of the United States" (WOTUS) and offer the following comments:

- AGFC appreciates the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers' (agencies) effort to grant, "... State and tribal authority over their own land and water resources." While Arkansas's waters of the state law is broad, we currently rely on the federal process to review proposed impacts to our streams and wetlands because we do not have the funding or staff to assume this responsibility. Under the proposed rule, ephemeral streams would be omitted. By omitting ephemeral streams the agencies are actually eliminating an opportunity for the state of Arkansas to make decisions about the discharge of pollutants into their waters through the Clean Water Act Section 401 water quality certification process. Arkansas would not be able to replicate this process with existing state resources.
- The agencies' Economic Analysis did not consider the cost to states for assuming greater responsibility in administering the regulatory program established by the proposed rule; the necessary administrative and staffing costs would most likely be passed along to the regulated public.

2 Natural Resources Drive • Little Rock, AR 72205 • [www.agfc.com](http://www.agfc.com)  
Phone (800) 364-4263 • (501) 223-6300 • Fax (501) 223-6448

---

*The Arkansas Game and Fish Commission's mission is to conserve and enhance Arkansas's fish and wildlife and their habitats while promoting sustainable use, public understanding and support.*

- The agencies are proposing to have the states, "... establish geospatial datasets of "waters of the United States...." AGFC would not support, "... the agencies... creating a framework under which States, Tribes, and Federal agencies could choose to develop datasets for approval for all, some or none of the "waters of the United States within their boundaries." The proposed rule does not indicate where the funding would come from to support this effort by the states. The state of Arkansas does not have the capability to focus mapping efforts on developing WOTUS datasets and, even if we did, we are concerned that our efforts would be in vain when the WOTUS definition can change with federal administrative and/or court decisions.
- AGFC requests a comment period extension. A sixty day comment period negates the principles of cooperative federalism and amounts to the federal government dictating how policy will be implemented without sufficient input from the states. The proposed rule is also attempting to give more oversight back to the states but there is no discussion in the rule how states are supposed to pay for this new responsibility and at what rate we are to assume it.
- In Section 662, Consultations between agencies, the Fish & Wildlife Coordination Act states, "... whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development."

A sixty day comment period is woefully inadequate for substantive consultation between the Arkansas Game & Fish Commission and the agencies. The in-person meetings held on March 8 and 9, 2019 between the agencies and representatives from the state of Arkansas, and the meeting held on March 22, 2018 with the Environmental Council of the States do not constitute compliance with Section 662 of the Fish & Wildlife Coordination Act. Those meetings were held with staff members of the Arkansas Department of Environmental Quality, not the Arkansas Game & Fish Commission who is, "... the agency exercising administration over the wildlife resources of the particular State..." as referred to in the Act.

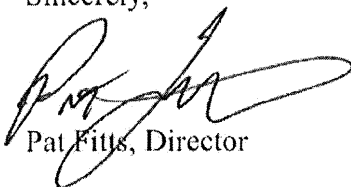
- Under this proposal wetlands separated by dikes or barriers are not jurisdictional because they do not have a direct hydrologic surface connection and they are not adjacent and/or abut a jurisdictional water. Relief wells installed by the U.S. Army Corps of Engineers outside levees along the Mississippi Rivers

& Tributaries Project is an indication that there is direct hydrologic connectivity between the batture and the outside of the levee. Not considering the connectivity through a levee could affect Congressionally authorized and federally funded flood control projects and structures, including Civil Works, on the outside of levees. AGFC does not agree with the proposed rule that there is no direct hydrologic connection.

- The proposed rule only considers wetlands, "... that abut or have a direct hydrologic surface connection to other waters of the United States in a typical year." It would be appropriate to include wetlands within the 100 year floodplain jurisdictional because those wetlands regularly contribute to the chemical, biological, and physical integrity of the regulated water.
- What is the scientific basis for the proposed rule to not include waters "... that flow only in response to precipitation; groundwater,..."? The 2015 definition of a "tributary" as a water that, "... contributes flow, either directly or through another water, to a traditional navigable water, interstate water, or the territorial seas and has the physical indicators of a bed and banks and an ordinary high water mark..." better achieves the proposed rule's stated goal to, "... increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States..."
- In Arkansas we are concerned about streams in our ecoregions, like the Mississippi Alluvial Valley, where the upper reaches of the streams would be considered to have ephemeral flow but regularly fill by means of backwater (reverse flow) flooding from waters that would be considered jurisdictional under the proposed rule. Hydric soils, hydrophytic vegetation, and hydrology are characteristics of the backwater flooded areas. These areas not only provide wildlife habitat but, of utmost importance for low lying areas, flood water storage. Not considering backwater flooded streams and their capacity to store floodwater, jurisdictional is in opposition to the U.S. Army Corps of Engineers' mission for disaster preparedness and flood risk reduction.
- AGFC requests that any waterway that was ever a part of a Congressionally authorized Civil Works Project be considered jurisdictional. Including these streams would acknowledge that if the U.S. Army Corps of Engineers ever altered or otherwise managed a waterway then it would have had to convey significant flow at some point in its history.

AGFC appreciates the opportunity to comment on this proposed rule.

Sincerely,



Pat Fitts, Director

2 Natural Resources Drive • Little Rock, AR 72205 • [www.agfc.com](http://www.agfc.com)  
Phone (800) 364-4263 • (501) 223-6300 • Fax (501) 223-6448

---

*The Arkansas Game and Fish Commission's mission is to conserve and enhance Arkansas's fish and wildlife and their habitats while promoting sustainable use, public understanding and support*